IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 12TH NOVEMBER 2007 / 21ST KARTHIKA 1929

RSA.No. 866 of 2006()

AS.20/2004 of SUB COURT,NEYYATTINKARA
OS.418/2000 of PRL.M.C.,NEYYATTINKARA
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APPELLANT/APPELLANT/DEFENDANT:

M. JAWAHARDEEN, S/O.MAITHEENKANNU,
RESIDING AT KINATTADIVILAKOM HOUSE, DEVARADANAM,
VIZHINJAM, THIRUVANANTHAPURAM.

BY ADV. SRI.K.B.PRADEEP

RESPONDENTS: RESPONDENTS/ADDL.DEFENDANTS 2 TO 6:
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1. **SOUDA BEEVI,**
   W/O.LATE MUHAMMED KANNU (ORIGINAL 1ST DEFENDANT),
   AGED 40 YEARS, ASMA MANZIL, DEVARDANAM, VIZHINJAM,
   THIRUVANANTHAPURAM.

2. **SAJINA, D/O.SOUDA BEEVI,**
   ASMA MANZIL, DEVARDANAM, VIZHINJAM,
   THIRUVANANTHAPURAM.

3. **SAHIRA, D/O. SOUDA BEEVI,**
   ASMA MANZIL, DEVARDANAM, VIZHINJAM,
   THIRUVANANTHAPURAM.

4. **SALIHA (MINOR),**
   ASMA MANZIL, DEVARDANAM, VIZHINJAM,
   THIRUVANANTHAPURAM.

5. **SULTANA (MINOR),**
   ASMA MANZIL, DEVARDANAM, VIZHINJAM,
   THIRUVANANTHAPURAM. (RESPONDENTS ARE THE WIFE AND CHILDREN OF THE DECEASED 1ST DEFENDANT IN OS AND ARE HIS LEGAL HEIRS). MINOR RESPONDENTS 4 & 5 ARE REPRESENTED BY THEIR MOTHER 1ST RESPONDENT).

BY ADV. SRI.R.S.KALKURA

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 12/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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R.S.A.No. 866 OF 2006

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DATED THIS THE 12TH DAY OF NOVEMBER, 2007

JUDGMENT

Plaintiff in O.S.418 of 2000 on the file of Munsiff Court, Neyyattinkara is the appellant. Defendant is the respondent. Appellant instituted the suit seeking a decree for mandatory injunction. Learned Munsiff dismissed the suit. Appellant challenged the decree and judgment before Sub court, Neyyattinkara in A.S.20 of 2004. Appeal was filed along with I.A.184 of 2004, an application under Section 5 of the Limitation Act to condone the delay of 790 days in filing the appeal. Learned Sub Judge dismissed the application and consequently dismissed the first appeal as barred by time. It is challenged in the second appeal.

2. Learned counsel appearing for the appellant was heard. The argument of the learned counsel is that first appellate court should have condoned the delay, in the light of evidence of Pws 1 and 2 and learned Munsiff decided the question of title also though suit was only for injunction and in such circumstances, opportunity has to be granted to the appellant to have a decision on merits in the first appeal and hence the order dismissing the

application to condone the delay and also the appeal as barred by time are to be set aside.

3. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. Appeal was filed after a delay of 790 days. Appellant examined himself as Pw1 and also examined PW2, the Ayurvedic Physician to prove his illness. First appellate court found that the reason alleged for non-filing of appeal in time was the illness of appellant and according to appellant, he was laid up from 20.7.2003 onwards and hence the delay till 29.1.2004 is to be condoned. First appellate court found that suit was disposed on 27.6.2001 and appellant had obtained carbon copy of the judgment for the purpose of filing appeal and if he was diligent he could have filed an appeal in time. It was also found that copy application for certified copy was filed only on 7.2.2003 and it was received on 26.7.2003 and though it was contended that he had originally applied for certified copy and the copy application was missing no evidence to substantiate the claim was adduced. In the nature of the materials placed before the court, dismissal of the application for condonation of delay cannot be said to be illegal. Moreover, the suit itself was only one for injunction. No specific

issue on the question of title was framed. In such circumstances, dismissal of the suit will not disentitle appellant from claiming appropriate relief on the strength of title.

There is no substantial question of law involved in the appeal. Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-